Nos. 99-100-101

Supreme Court of the United States

October Term, 1922
Nos. [redacted]

SIMON HECHT AND SUMMIT L. HECHT
TRUSTEES

v.

JOHN F. MALLEY, FORMER COLLECTOR
OF INTERNAL REVENUE

ARTHUR L. HOWARD AND ROBERT S.
BARLOW, TRUSTEES

v.

JOHN F. MALLEY, FORMER COLLECTOR
OF INTERNAL REVENUE

ARTHUR L. HOWARD AND ROBERT S.
BARLOW, TRUSTEES

v.

ANDREW J. CASEY, FORMER ACTING
COLLECTOR OF INTERNAL REVENUE

Brief for Petitioners

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February 1923.

TABLE OF STATUTES

TABLE OF CASES

SUMMARY

ARGUMENT

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Nos. 532, 533, 534

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v.

JOHN F. MALLEY, Former Collector of Internal Revenue.

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Brief for Petitioners

Statement of the Case

These three cases come before this court on a writ of certiorari to the Circuit Court of Appeals for the First Circuit granted on the petition of the plaintiffs. The suits

were begun in the District Court of the United States for the District of Massachusetts against former Collectors of Internal Revenue for refunds of capital stock excises paid under protest.

The plaintiffs are Simon Hecht and Summit L. Hecht, Trustees of the Hecht Real Estate Trust, and Arthur L. Howard and Robert S. Barlow, Trustees of the Haymarket Trust.

These excises were assessed in part under the Revenue Act of 1916 and in part under the Revenue Act of 1918.

The District Court held that the plaintiffs were Trustees of trusts and were not corporations, joint stock companies or associations with a capital stock, and that the class of bodies subjected to this excise by the Acts of 1916 and 1918 had not been changed from what it was under the Act of 1909, under which the Supreme Court held, in *Eliot* v. *Freeman*, 220 U. S. 178, that such trusts as those at bar were trusts and could hardly be said to be "organized" and certainly were not organized "under law" and enjoyed no "privilege." The District Court gave judgment for the refunds to the plaintiffs. The Circuit Court of Appeals reversed this judgment.

The petitioners contended below and now contend that they are trustees and not a corporation, joint stock company or association with a capital stock, created or organized under law, enjoying any privilege or subject to the capital stock excise.

Statement of Facts

The Declarations of Trust under which these Trustees act and the methods by which the terms of the trusts are carried out are set out in the opinion of the District Court (Record, pp. 20, 52, 25) and in the statement of facts found (Record, pp. 67, 8).

The Hecht Trust: Members of the Hecht family holding title as tenants in common to real estate conveyed it in 1899 to Jacob H. Hecht to hold in trust for the beneficiaries named, and their assigns. Certificates for one thousand (1,000) shares were issued to the beneficiaries severally in accordance with their proportionate interests. The shares are for one thousandths of the beneficial interest and have no par or unit value. The trustee and his successors have managed the property since and distributed the net rentals to the shareholders. No meetings of the shareholders have been held. No amendment of the trust had been made when this case was tried. Some shares have been transferred. Annual statements have been sent to shareholders. The books contain, among others, a capital account and a surplus account. Transfers have been made from surplus to capital. Shareholders in their individual income-tax returns have treated the distributions from the trust in the same manner as dividends from a corporation. The trustees under protest have filed returns as required by the Commissioner of Internal Revenue and paid the assessments in question, levied by him as a capital-stock tax (Record, pp. 95 to 105). The indenture of trust (Record, pp. 76 to 87) declares that the trust shall be known as the Hecht Real Estate Trust; that it shall continue for twenty years after Jacob H. Hecht's death; that transferable certificates shall be issued to the beneficiaries, to be offered to the trustee before any sale except to a member of the Hecht family; that the trustee shall have full powers of management, including sale of the trust property and purchase of other, and power to borrow and to mortgage, but no power to create any personal liability on the shareholders; that the trustee may appoint one or more co-trustees; that the trustee shall fill all vacancies except that Louis

Hecht, Jr., and Marcus H. Hecht, successively, shall succeed Jacob H. Hecht; that the shareholders may direct an increase in the number of trustees or remove a trustee by a deed executed by the holders of three-fourths of the shares, and may, if there is no trustee to make the appointment, appoint a new trustee by a deed executed by the holders of three-fifths of the shares, and may modify or terminate the trust or give instructions to the trustee by deed executed by the holders of three-fifths of the shares. The shareholders have no powers of control.

The Haymarket Trust· In September, 1900, joint owners of a building in Boston gave a broker an option to purchase it. At his suggestion, John V. Bryant and Frank E. Sweetser, as trustees, drew an indenture of trust to be signed by them and by subscribing shareholders who should furnish the money to make the purchase. The money was subscribed. The trustees acquired the property under the option and paid the broker $2,500 for obtaining the subscriptions. The trustees issued certificates for transferable shares to the subscribers. The trustees and their successors have managed the property and distributed the income. They have made annual statements. Annual shareholders' meetings have been held. Vacancies caused by death and by resignation have been filled by the election of new trustees by the shareholders. Shares have been transferred. The trustees, under protest, have filed returns as required by the Commissioner of Internal Revenue and paid the assessments in question levied by him as a capital-stock tax (Record, pp. 10 to 26). The indenture of trust (Record, pp. 34 to 42) declares that the trustees shall be known as Trustees of the Haymarket Trust; that the trustees shall have general powers of management including powers of mortgage

and sale, and to invest any surplus, but no power to bind the shareholders personally; that persons contracting with the trustees should look only to the trust property; that shareholders shall receive transferable certificates; that income above five per cent shall go into a sinking fund to retire mortgages; that annual meetings of shareholders shall be called, and special meetings may be; that at meetings the holders of a majority of the entire number of shares may fill any vacancy in the number of trustees, may depose any trustee and elect others, may authorize the sale of the property, and may amend the agreement and may decide on matters properly coming before them; that the trust shall continue for twenty years after the death of the last survivor of named individuals.

The trustees of each of these trusts hold Massachusetts real estate. The trust indentures were executed in Massachusetts by Massachusetts parties. They are Massachusetts trusts.

Argument

In *Eliot* v. *Freeman*, 220 U. S. 178 this court decided that the Cushing Real Estate Trust and the Department Store Trust, which had features in common with the trusts now before the Court, were trusts and not corporations, joint stock companies or associations liable to the corporate excise tax under the Act of August 5, 1909. This decision is conclusive of the cases at bar unless the later capital stock tax acts have so changed the law as to require a different decision. It is submitted that they have not.

The Capital Stock Tax is an Excise on a Special Privilege

The capital stock tax is not and has not been an income tax. It is an excise on a special privilege.

> *Flint* v. *Stone and Tracy Co.*, 220 U. S. 107, 145, 150, 151.

This is shown by the history of the Acts of Congress hereinafter referred to in detail, and by the decisions of this Court in the light of which the later acts were passed.

These Trusts enjoy no Special Privilege under Massachusetts Laws, Common or Statutory

These trustees have no franchise. The law gives them no protection not shared by all citizens. The trusts were established by deeds of trust of the long-time familiar type. No lawyer would think of them as corporations or quasi-corporations. They are naturally classified as trusts. No statute gives them any special powers.

Not only do they have no corporate powers and privileges, but, on the contrary, the absence of any

possibility of obtaining such powers and privileges, under Massachusetts laws, was the occasion for drawing such trust deeds. At the inception of the trusts now before the court, there was no general statute in Massachusetts for the organization of corporations to deal in real estate. Such an artificial entity, and the attendant absence of personal liability on the part of the shareholders, was not open under general laws to those desirous of becoming shareholders in a real estate business. This privilege, open to shareholders in other classes of business, was denied them.

The Circuit Court of Appeals, of its own initiative, refers, in the case at bar, to the statutes of Massachusetts imposing special *duties* upon trustees of trusts with transferable shares. Two things are noteworthy: one, that none of these statutes give any *privileges*, and the other that they were in existence before 1911 and governed the bodies held not to be subject to the tax in *Eliot* v. *Freeman*.

On May 24, 1909, Massachusetts enacted chapter 441 of the acts of that year, which provided that —

> "Section 1. Trustees of a voluntary association under a written instrument or declaration of trust the beneficial interest under which is divided into transferable certificates of participation or shares, shall file a copy of such written instrument or declaration of trust with the commissioner of corporations and with the clerk of every city or town in which such association has a usual place of business."

This act followed a policy to provide record evidence of the constituency of business concerns. In 1907, chapter 539, it had been provided that —

> "Section 1. Any person or persons conducting or transacting business in this Commonwealth under any name, designation or title other than the real name or names of the person or persons conducting or transacting such business, whether individually or as a firm or partnership, shall file in the office of the Clerk of the city or town in which the place or places of business or office or offices of any such person, firm or partnership may be situated, a certificate stating the full name and residence of each person engaged in or transacting such business."

Section 2 of this act exempted certain bodies, including —

> "Any firm, partnership, joint-stock company or association the business of which is conducted or transacted by trustees under a written instrument or declaration of trust, provided that the names of such trustees with a reference to such instrument or declaration of trust shall be filed as provided in Section 1."

The title of chapter 441 of the acts of 1909, in force when *Eliot* v. *Freeman* was decided, was "An Act Relative to Voluntary Associations Under Written Instruments." This act without significant change is now codified in General Laws of Massachusetts, chapter 182, sections 1 and 2, now in force. The Massachusetts act of 1916, chapter 184, provided that such a body may be sued in an action at law for debts and other obligations or liabilities, and also that its property should be subject to attachment in like manner as if it were a corporation. This is now General Laws, chapter 182, section 6. No *rights* or *privileges* were given.

Although no Special Privileges are given, under the laws either of the United States or of Massachusetts, to shareholders in such trusts, they are in certain cases subject to personal liability.

The decisions in Massachusetts have classified such trusts into strict trusts and partnership trusts for purposes of taxation and for liability for debts. If the entire control is in the trustees, they are trusts. If a sufficient degree of control is in the shareholders, the property of the trust may be taxed as partnership property and the shareholders may have the liability of partners, for debts.

Williams v. *Milton*, 215 Mass. 1.
Horgan v. *Morgan*, 233 Mass. 381.
Dana v. *Treasurer*, 227 Mass. 563, 565.
Frost v. *Thompson*, 219 Mass. 360.
Taber v. *Breck*, 192 Mass. 355.
Williams v. *Boston*, 208 Mass. 497.
Hoadley v. *County Commissioners*, 105 Mass. 519.
Gleason v. *McKay*, 134 Mass. 419.
Phillips v. *Blatchford*, 137 Mass. 510.
Ricker v. *American Loan and Trust Co.*, 140 Mass 346.
Edwards v. *Warren Linoline Works*, 168 Mass. 566.
Hussey v. *Arnold*, 185 Mass. 202.
Peabody v. *Treasurer and Receiver General*, 215 Mass. 129.

Under Massachusetts law, no extent of control on the part of the shareholders converts these trusts into corporations, joint stock companies or associations. They are either trusts or partnerships. If they are partnerships, the shareholders are under the unlimited liability of partners for debts. There is no special *privilege*.

The Excise Tax Act of 1909 laid an excise upon those bodies only which were organized under law and so enjoyed a Special Privilege.

The special *privilege* taxed by this law was that of doing business by authority of law as an *artificial entity* with *freedom from general partnership liability.* This was a new tax imposed in 1909.

President Taft, soon after his inauguration on March 4, 1909, sent Congress a message (44 Congressional Record, p. 3344) in the course of which he said:

> "I therefore recommend an amendment to the tariff bill imposing on all corporations and joint stock companies for profit an excise tax measured by 2% of the net income of such corporations. This is an excise tax upon the privilege of doing business as an artificial entity and of freedom from a general partnership liability enjoyed by those who own the stock."

On August 5, 1909, evidently in consequence of this message, an act was passed which provided that —

> "Every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the Acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually a special excise tax

with respect to the carrying on or doing business by such corporation, joint stock company or asso-citation, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed; or if organized under the laws of any foreign country, upon the amount of net income over and above five thousand dollars received by it from business transacted and capital invested within the United States and its Territories, Alaska, and the District of Columbia during such year, exclusive of amounts so received by it as dividends upon stock of other corporations joint stock companies or associations, or insurance companies, subject to the tax hereby imposed." (36 U. S. St. at L., c. 6, sec. 38.)

On March 29, 1910, the Attorney-General gave an opinion that a partnership *having a limited liability by law* was a joint-stock company within this act (28 Opinions of the Atty.-Gen. 189, 192; Treasury Decisions No. 1606, vol. 19, No. 13, p. 32).

On March 13, 1911, the act was construed in two decisions by this Court — *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, and *Eliot* v. *Freeman*, 220 U. S. 178.

In *Eliot* v. *Freeman* all the trusts involved were subject to the Massachusetts statute law above quoted. Two of these trusts, the Cushing Real Estate Trust and the Department Store Trust, had features in common with the trusts now before the Court. The Department Store Trust had all the elements to make it a

partnership or association (in distinction from a trust), which can be found in either of the trusts now before the Court.

Flint v. *Stone Tracy Co.* upheld the constitutionality of the tax, against an attack upon it as a tax upon income. The Court held that it was not an income tax, but that the tax, although measured by income as a reasonable method, was an excise tax. The Court said (145, 150 and 151):

> "That is, when imposed in this manner it is a tax upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint stock organizations of the character described. As the latter organizations share many benefits of corporate organization it may be described generally as a tax upon the doing of business in a corporate capacity."
>
> "A tax upon business done in a corporate capacity."
>
> "The tax under consideration, as we have construed the statute, may be described as an excise upon the particular privilege of doing business in a corporate capacity, *i.e.*, with the advantages which arise from corporate or quasi-corporate organization."
>
> "The requirement to pay such taxes involves the exercise of privileges." (192 U. S. 363.)

The same view was expressed again, much later, in *Stratton's Independence* v. *Howbert*, 231 U. S. 399, 416.

In *Eliot* v. *Freeman*, decided at the same time with *Flint* v. *Stone Tracy Co.*, the Court, in holding the trusts before the Court (*a fortiori* the trusts now before

the Court) to be trusts and not subject to this excise tax, said (186):

> "The language of the Act '. . . now or hereafter organized under the laws of the United States,' etc., imports an organization deriving power from statutory enactment."
>
> "A trust of the character of those here involved can hardly be said to be organized, within the ordinary meaning of that term; it certainly is not organized under statutory laws as corporations are."
>
> "There is an essential difference between a joint stock company as it exists at common law and a joint stock company having extensive statutory powers conferred upon it by the State within which it is organized. The latter kind of joint stock company is found in England and in the State of New York." (Cook on Corporations, sec. 505.)

In this opinion two grounds are assigned, either of which is sufficient to hold that these trustees are not subject to this excise tax, namely, one, that they are not created *under law*, and the other, that they are not *organized*. This interpretation, in *Eliot* v. *Freeman*, of the language used in the Excise Tax Act of 1909, in the light of which the subsequent acts have been framed, has never been modified. There has been no change in the language used by the Congress in the subsequent acts imposing this excise tax which indicates an intention to make so radical a change as to impose a *privilege tax* upon bodies that do not enjoy any privilege.

The Excise Tax of 1909 was dropped in the Income Tax Act of 1913

The first income tax act, of October 3, 1913 (38 Stats. c. 16, sec. 2), dropped the excise tax on corporations and imposed an income tax on individuals as well as on corporations. Section 2, paragraph G, imposing on corporations the same tax as the normal tax imposed on individuals, defined corporations as follows:

> "Every corporation, joint stock company or association and every insurance company organized in the United States, *no matter how created or organized, but not including partnerships,* but if organized, authorized or existing under the laws of any foreign country, then upon the amount of net income accruing from business transacted and capital invested within the United States during such year." (Italics not in original.)

This was not an excise tax. No more was imposed on corporations than on individuals. The classification affected the method of levying the tax rather than the substance of the tax.

Notwithstanding these italicized words, a typical real estate trust even with transferable shares is not an association.

Crocker v. *Malley*, 249 U. S. 223.

The unauthorized attempt by Treasury Regulation in 1914 to tax trusts as Associations

On June 5, 1914, a treasury regulation was issued which provided that

> " 'corporations' as used in these regulations shall be construed to include all corporations, joint stock companies or associations and all insurance companies coming within the terms of the law and such

organizations will hereinafter be referred to as 'corporations,'" and

"it is immaterial how such corporations are created or organized," and the term,

"'joint stock companies or associations' shall include associations, real estate trusts, or by whatever name known, which carry on or do business in an organized capacity, whether organized under and pursuant to state laws, trust agreements, declarations of trust, or otherwise, the net income of which, if any, is distributed or distributable among the members or shareholders on the basis of the capital stock which each holds, or when there is no capital stock, on the basis of the proportionate share of capital which each has invested in the business and all of which joint stock companies or associations shall, in their organized capacity, be subject to the tax imposed by this act." Reg. 33 Art. 78, 79.

In *Crocker* v. *Malley*, 249 U. S. 223 (March 17, 1919) this court held that a trust much like those now at bar and clearly within the language of this regulation was not an association. This decision disclosed that the regulation was unauthorized.

On October 22, 1914, Congress imposed a tax on the transfer of shares in "corporations, associations and companies" without any further definition. The tax here imposed was not on existence as an association. It was on transfers of shares. The transfer was the privilege taxed. *Malley* v. *Bowditch*, 259 Fed. 809.

On July 21, 1915, the United States Express Company, which enjoys special privileges under the statutes of New York, was held to be an association or joint stock company.

Roberts v. *Anderson*, 226 Fed. 7.

The Income and Excise Tax Act of 1916 restored the Excise Tax of 1909 as to the bodies subject to the Capital Stock Excise

On September 8, 1916, Congress enacted the Income Tax Act, following the act of 1913, and also re-enacted the Excise Tax, which had first come into existence in 1909 and had been abandoned in 1913. The excise at this time was changed from one based on income to one based on the value of the capital stock. This act, in defining corporations for income-tax purposes, carried forward substantially the language of the act of 1913; and in defining corporations for excise-tax purposes, carried forward substantially the language of the act of 1909. This was an enactment of the interpretation which in *Eliot* v. *Freeman* the Supreme Court had put upon the language of the act of 1909.

Title I, section 10 — the income-tax section — required the payment of the tax—

> "By every corporation, joint-stock company or association, or insurance company, organized in the United States, *no matter how created or organized* but not including partnerships, . . . by every corporation, joint-stock company or association, or insurance company organized, authorized, or existing under the laws of any foreign country." (Italics not in original.)

Title IV, section 407 — the excise-tax section — provided that —

> "Every corporation, joint-stock company or association, [now or hereafter] *organized* [in the United States] for profit and having a capital stock represented by shares, and every insurance company, now or hereafter *organized under the*

> *laws of the United States, or any State or Territory of the United States,* shall pay annually a special excise tax with respect to carrying on or doing business by such corporation, joint-stock company or association, or insurance company, equivalent to fifty cents for each one thousand dollars of the fair value of its capital stock and in estimating the value of capital stock the surplus and undivided profits shall be included. . . .
>
> "Every corporation, joint-stock company or association, or insurance company, now or hereafter organized for profit *under the laws of any foreign country* and engaged in business in the United States shall pay . . . " (Italics and brackets not in original.)

The only change in this language from that of the act of 1909 was in adding, after the word "association," the words "now or hereafter," and in adding, after the word "organized," the words "in the United States." There is no change in the comma after insurance company. If the words in the brackets are omitted, the description in this act is the same as that in the act of 1909. The reason for the addition of these bracketed words is apparent on observing the form in which the tax was imposed on the domestic corporation and on the foreign corporation in the two sections, respectively. In the act of 1909 the corporate and quasi-corporate bodies were defined, once for all, at the beginning of the section — whether they were domestic or foreign. The subsequent parts of the section fixed the amount of the tax in accordance with the place of organization — whether domestic or foreign — but did not repeat the words "corporation, joint-stock company, association or insurance company." In the act of 1916 foreign and domestic corporations,

respectively, were thrown into separate paragraphs of the section, and the words "corporation, joint-stock company, association or insurance company" are repeated in the second paragraph. This accounts for the inclusion of the words "in the United States" in the first paragraph. The words "*organized under the laws of the United States or of any State or Territory of the United States,*" construed in *Eliot* v. *Freeman*, appear in the act of 1916, preceded by the *same comma* to separate them from insurance company, and in exactly the *same place* in which they appeared in the act of 1909. The Court had held in *Eliot* v. *Freeman* that these words applied not merely to insurance companies, but also to corporations, joint-stock companies and associations. When re-enacted in 1916, in the same position, these words had the same application. They qualified associations. It is respectfully submitted that if this section stood alone, it would be clear that it was a re-enactment of the act of 1909, as interpreted in *Eliot* v. *Freeman;* but the section does not stand alone. The rest of the act makes the conclusion even clearer, because Congress, in section 10, when not imposing a privilege tax, but merely defining the method of application of a general income tax, used the words "*no matter how created or organized,*" and left out the words "*organized under the laws of the United States or any State or Territory of the United States.*" The words "no matter how created or organized" in the income-tax section were probably adopted because of the decision in *Eliot* v. *Freeman* and with the intention of imposing the *income* tax on associations as a group instead of levying it on the individual members of the association. This was a convenient method, and did not increase or diminish the tax. It was not a privilege tax. The Congress which used these words and omitted the words "organized

under the laws of the United States or any State or Territory of the United States" in the income-tax section and reversed the process in the excise-tax section must have meant something. What was meant was not to impose a privilege tax on bodies that enjoy no privilege.

This marked distinction between the income-tax section and the excise section is emphasized by the course of the act through Congress. The bill as read in the House provided for an income tax, but for no corporate excise tax (Congressional Record, 64th Congress, 1st Session, vol. 53, p. 10663). In reporting the bill with amendments to the Senate, the chairman, Senator Simmons, said: "We have also provided for imposing a small tax upon corporations in the nature of a license tax for doing business." (Senate Reports, 64th Congress, 1st Session, vol. 3, Miscl. 3, Rep. 793, p. 2.) The section so reported was as follows:

> "Section 56. That on and after January first, nineteen hundred and seventeen, special taxes shall be and hereby are, imposed annually as follows, that is to say:
>
> "First. Corporations, joint stock companies, and associations shall pay 50 cents for each $1000 of capital, surplus, and undivided profits used in any of the activities or functions of their business, including such sums as may be invested in or loaned upon stock, bonds, mortgages, real estate, or other securities. The amount of such annual tax shall in all cases be computed on the basis of the capital, surplus, and undivided profits for the preceding fiscal year. Every corporation, joint stock company, or association as defined and limited in Section ten, Title 1 of this Act, shall be liable to this tax: . . ."

Title I, section 10, so referred to, imposed the income tax and had in it the words "*no matter how created or organized.*" Apparently the House was unwilling to make this extension of this excise tax so as to cover bodies that had no special privilege. The Conference report is "Agreed to Senate amendment #206 and in lieu of matter inserted by said amendment, insert the following." Then follows the title IV, section 407, as finally enacted, leaving in the words "*organized under the laws of the United States or any State or Territory of the United States*" and leaving out the words "*no matter how created or organized.*" With the distinction clearly brought to its attention, Congress decided not to impose a privilege tax upon bodies that enjoyed no privileges.

Notwithstanding this, an attempt was made to cover such trusts as those at bar by Treasury Regulation No. 38, Article 2, which provided that:

> "The tax applies to every corporation, joint-stock company or association (except insurance companies), now or hereafter organized in the United States for profit and having a capital stock represented by shares, irrespective of whether it is the creature of statute or of contract. A corporation is organized for profit if its stockholders or members may benefit pecuniarily from its operations. Joint-stock associations not organized under any statute and so-called Massachusetts trusts are subject to the tax."

There had been no change in the law from that of 1909 which would warrant such a regulation. The invalidity of such a regulation was subsequently shown by the decision in *Crocker* v. *Malley*, 249 U. S. 223.

Income and War-Profits Tax Act of 1917

The act of March 3, 1917, made no change of importance in the present connection, from that of 1916.

The act of October 3, 1917, imposed the war-profits tax, amended the act of 1916 as to the amount of income tax, and brought forward the stamp tax. This act did nothing to the excise-tax law. That law remained as it was under the act of 1916. The act of 1917 introduced a definition section (200). This section is in Title II, "War Excess Profits Tax." It provides that:

> "Section 200. That when used in this title —
>
> "The term 'corporation' includes joint-stock companies or associations and insurance companies;
>
> "The term 'domestic' means created under the law of the United States, or of any State, Territory or District thereof, and the term 'foreign' means created under the law of any other possession of the United States or of any foreign country or government."

It is evident that this section contemplates nothing as a corporation, joint-stock company, association or insurance company unless it is either domestic or foreign. To be either of these it must be "*created under the laws of.*" Accordingly, this act does not include in this classification a body formed by voluntary indenture of trust without any privileges granted by law. It will be noted that the word "created" is here used as including "organized." The word "organized" plays no part in the definition.

The Revenue Act of 1918 did not change the Act of 1909 or the Act of 1916 as to the bodies subject to the Capital Stock Excise

The Revenue Act of 1918, enacted February 24, 1919, covered war profit, excess profit, income, excise, and many other taxes. This act has a definition section for all purposes of the act. The definition is apparently derived from the act of 1917. It provides that:

> "Section 1. That when used in this act . . .
>
> "The term 'person' includes partnerships and corporations, as well as individuals;
>
> "The term 'corporation' includes associations, joint-stock companies, and insurance companies;
>
> "The term 'domestic' when applied to a corporation or partnership means created or organized in the United States; the term 'foreign' when applied to a corporation or partnership means created or organized outside the United States."

Some change in phraseology from the act of 1917 was necessary, even if no change in meaning was intended, because the definition section covered partnerships as well as corporations. It would not have been appropriate, in defining "domestic" and "foreign" partnerships, to speak of them as "organized under the laws of." Therefore, the word "in" is used as a word which is applicable both to partnerships and to corporations. The idea that a corporation could be organized except "under the laws of" is inconceivable. A general definition section without more would not be enough to make a radical change in the character of a tax imposed by a particular section, couched in language not itself significant of any intention to change the nature of the tax.

This act, in imposing the excise tax, shows clearly

an intention to apply it to the same class of bodies as had been described in the excise section of the act of 1916, above quoted. It provides that:

> "Section 1000 (a). That on and after July 1, 1918 *in lieu of the tax imposed by the first subdivision of section 407 of the Revenue Act of 1916* —
>
> "(1) Every 'domestic' corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to one dollar for each one thousand dollars of so much of the fair average value of its capital stock for the preceding year ending June 30th as is in excess of five thousand dollars. In estimating the value of capital stock the surplus and undivided profits shall be included;
>
> "(2) Every 'foreign' corporation shall pay annually . . . of the average amount of capital employed in the transaction of its business in the United States . . . " (Italics not in original.)

This is a corporation excise. There is no change in phraseology sufficient to indicate an intention to impose a privilege tax on a body that did not enjoy a privilege and which would not be taxed under the earlier acts. Nine years before, the tax had come into existence as a privilege tax after the President's recommendation to impose a tax upon "*the privilege of doing business as an artificial entity and of freedom from a general partnership liability enjoyed by those who own the stock.*" The law had been interpreted by this Court in *Eliot* v. *Freeman* as imposing the tax only as a *privilege tax*. That definition had been known for seven years. If the Congress had any intention to change the nature of the tax, it was easy to express it. There has been no such expression.

That there was no intention to enlarge or to make any change from the 1916 law in that respect is confirmed by the statement of Mr. Kitchin, the House chairman, in laying the Committee's report before the House. He said: "We have made a very important change in the rates and in the exemptions of what is known as the corporation capital stock tax that has been on the statute books for two years. The tax is now 50 cents on each thousand dollars of so much of the fair average value of its capital stock for the preceding year as is in excess of 99,000. The fair average value is the language of existing law and is carried in this bill. We make the tax $1.00 on each $1,000 of the 'fair average value' of the stock in excess of $5,000" (Congressional Record, vol. 56, part 12, 65th Congress, 2d Session, Appendix, p. 698). Senator Simmons, the Senate chairman, in his report (65th Congress, 3d Session, 1918-1919, Senate Reports, vol. 1, No. 617, p. 17) said: "The House Bill provided for the continuance of the capital stock tax on the basis of the fair average value of the capital stock of the corporation for the preceding year. The determination of fair average value has proved in administration to be very difficult. The committee has accordingly provided that the basis of the tax shall be the amount of the net assets of the corporation as shown by its books, etc." The use of the word "continuance" does not indicate an intention to tax different bodies from those taxed under the earlier act. If there had been any intention to make a change in the class of bodies to be taxed, it would have been mentioned.

As the act of 1918 consolidated so many different tax acts which had received prior judicial construction, the principle announced by this Court becomes applicable, that —

"Even where inadvertent changes have been made by incorporating different statutes together, it has been held not to change their original construction. Thus, in New Jersey, where several English statutes had been consolidated, a proviso in one of them, broad enough in its terms to affect the whole consolidated law, was held to affect only those sections with which it had been originally connected. . . . "

"So, upon a revision of statutes, a different interpretation is not to be given to them without some substantial change of phraseology — some change other than what may have been necessary to abbreviate the form of the law."

McDonald v. *Hovey*, 110 U. S. 619, 628, 629.

"It is not to be inferred that Congress, in revising and consolidating the statutes, intended to change their effect, unless an intention to do so is clearly expressed."

Logan v. *United States*, 144 U. S. 263, 302.

"At the time of the revision in 1872, Section 22 was divided into several shorter sections and included in the revision according to an arrangement, adopted for purposes of convenience only, whereby the several parts of the original section became more or less separated; but that, in the absence of some substantial change in phraseology, did not work any change in their purpose or meaning."

Buck Stove Co. v. *Vickers*, 226 U. S. 205, 213.

It is a general principle of statutory construction that a re-enactment or an enactment of language which has received an authoritative interpretation by the Supreme Court is virtually an enactment of that inter-

pretation, and also that a change is not to be inferred in the absence of clear language requiring it.

The "Abbotsford," 98 U. S. 440.
Latimer v. *United States*, 223 U. S. 501.
United States v. *Sixty-Five Terra-Cotta Vases, etc.*, 18 Fed. 508 (C.C. S.D. N.Y.).
United States v. *Trans-Missouri Freight Association, et al.*, 58 Fed. 58 (C.C.A. 8th).
In re Guggenheim Smelting Co., 121 Fed. 153 (C. C. D. N.J.).
Schmidt v. *United States*, 133 Fed. 257 (C.C.A. 9th).

Also, it is well settled that an ambiguity in a tax statute is to be resolved in favor of the taxpayer rather than in favor of the Government.

Gould v. *Gould*, 245 U.S. 151.
United States v. *Isham*, 34 U. S. 496, 504.
Hartranft v. *Wiegmann* 121 U. S. 609.
American Net and Twine Co. v. *Worthington*, 141 U. S. 468.
Eidman v. *Martinez*, 184 U. S. 578, 583.
Swan and Finch Co. v. *United States*, 190 U. S. 143.
Benziger v. *United States*, 192 U. S. 38.
Parkview Bldg. and Loan Assn. v. *Herold*, 203 Fed. 876 (D.C. D. N.Y.), affirmed 210 Fed. 577 (C.C.A. 3d).
Haiku Sugar Co. v. *Johnstone*, 249 Fed. 103 (C.C.A. 9th).
United States v. *Coulby*, 251 Fed. 982 (D.C. N.D. Ohio, E.D.), affirmed 258 Fed. 27 (C.C.A. 6th).

Scott v. *Western Pacific Ry. Co.*, 246 Fed. 545 (C.C.A. 9th).

Spreckels Sugar Ref. Co. v. *McClain*, 192 U. S. 397.

United States v. *Wigglesworth*, 2 Story, 369, 28 Fed. Cas. No. 16,690.

The act of 1918 discloses no intention to change the class of bodies subjected to this privilege excise.

The attempt by Treasury Regulation to impose the Corporation Excise on trusts, merely because the shareholders have control by vote, is unauthorized.

By the regulation of June 5, 1914, and by Treasury Regulation No. 38 (above quoted), under the Act of 1916, an attempt was made to classify real estate trusts, particularly Massachusetts Trust, as associations subject to the capital stock excise even if formed by trust deeds and not organized under any law, if the income was distributable among the shareholders in proportion to their interest in the capital of the trust.

On March 17, 1919 the decision in *Crocker* v. *Malley*, 249 U. S. 223, disclosed that this attempt was not warranted by law.

Thereafter these regulations were modified so as to exclude such real estate trusts where the beneficiaries had no control but to include them where the beneficiaries had control. Treasury Regulation No. 50, as revised, provides that:

> "Art. 7. Massachusetts trusts. — The test of liability in all cases involving trusts of the Massachsetts type is whether the *cestuis que trustent* have by the terms of the trust agreement a voice in the management or control of the trust. Where the trustees are in complete control of the business, the beneficiaries having no control except the right of filling vacancies among the trustees or of consenting to a modification of the terms of the trust or of dissolving the trust, no association exists. If, however, the *cestuis que trustent* have a voice in the control or management of the business of the trust, whether through the right to elect trustees periodically or to remove the trustees or to restrict the trustees as to the management of the trust or

otherwise, the trust is an association within the meaning of the statute. Where the trustees hold in their own right a sufficient number of the certificates of beneficial interest to constitute control as between the beneficiaries, the trust will be held to be an association regardless of the powers conferred upon the trustee by the instrument creating the trust."

It is submitted that there is no warrant for this attempt to limit the effect of the decision in *Crocker* v. *Malley* to those trusts only in which the beneficiaries do not have control. The shareholders in the Department Store Trust which was held in *Eliot* v. *Freeman* to be a trust not subject to a capital-stock excise, had a voting control of the affairs of the trust.

If a trust in which the beneficial interests are represented by transferable certificates, is, as was held in *Crocker* v. *Malley*, not an association but a trust, it does not cease to be a trust and become an association merely because the shareholders have voting powers.

The fact that a trust may be amended or even terminated does not make it any the less a trust.

Kelley v. *Snow*, 185 Mass. 288.
Mackernan v. *Fox*, 220 Mass. 197.

In *Crocker* v. *Malley* this Court distinguishes clearly between an "association" and a "trust," saying:

"On the other hand, the trustees by themselves cannot be a joint-stock association within the meaning of the act unless all trustees with discretionary powers are such, and the special provision for trustees in D, is to be made meaningless. We perceive no ground for grouping the two — bene-

> ficiaries and trustees — together, in order to turn them into an 'association,' by uniting their contrasted functions and powers, although they are in no proper sense associated. It seems to be an unnatural perversion of a well-known institution of the law."

If the distinction attempted by the Treasury Regulation were valid, it would produce this extraordinary result: Under the laws of Massachusetts, if there is no control in the shareholders the trust is a trust and the shareholders are not personally liable. On the other hand, if there is full control in the shareholders they are under a general partnership liability. Under the Treasury Regulation, if the shareholders are not in control, and, therefore, not personally liable, the trust is not subject to the capital stock excise, but if the shareholders are in control, and, therefore, personally liable, the trust is subject to this excise. Thus, the whole scheme of the excise law is overturned. This tax came into existence as an excise upon "*the privilege of doing business as an artificial entity and with freedom from general partnership liability.*" It would take very clear language to indicate that Congress intended such an inverted result. There is nothing in the language used which indicates such an intention.

The Plaintiffs are Trustees and Not Associations.

The act of 1918 recognizes for purposes of taxation at least four different taxable bodies, namely, (1) individuals, (2) partnerships, (3) corporations (including quasi-corporations), and (4) trustees. "Association" is a loose general term which has no such well-defined meaning as "corporation," "joint stock company," "partnership" or "trust." (*Smith* v. *Anderson,* (Ct. of App.) 15 Ch. Div. 273.)

It gets its definition from its context, and may well have a different meaning in different parts of the same act, as called for by the context. For instance, a gift to an association that has no special privileges may be a proper deduction as a charitable gift. Notwithstanding this, the association may not be subject to an excise tax.

It is a general principle of tax interpretation that where, in any tax act, there are general and specific descriptions which in any manner conflict, the tax will be levied under the more exact description.

> *Arthur* v. *Zimmerman,* 96 U. S. 124.
> *Movius* v. *Arthur,* 95 U. S. 144.
> *Arthur* v. *Lahey,* 96 U. S. 112 at 116.
> *American Net and Twine Co.* v. *Worthington,* 141 U. S. 468.

Of the four classes described in the Act of 1918, the plaintiff trustees naturally fall in to the class of "trustees" and not into that of "corporations." The usual characteristics of a trust exist. They were launched by an indenture of trust. The legal title is in the trustees. They administer the trust. This is true even if they could be said to be so far subject to the control of the beneficiaries that the beneficiaries are subject to the liability of partners.

In the normal use of language it would not occur to anybody to speak of Louis Hecht and Simon Hecht, or of Howard and Barlow, as associations. They are trustees. They enjoy no special privileges. They manage the real estate in the way that typical trustees under a will would manage it. They are liable, as contractors would be at common law. They may bargain for exemption from liability, but if they obtain it, they obtain it by voluntary agreement of those who contract with them. Their liability for damages sustained by others in the use of the property, and their liability for debts is the same as that imposed by the law on other owners and debtors.

Contractual provisions as to the transferability of shares do not make the relations any the less those of trustee and beneficiary. Vested beneficial interests under a trust are usually transferable, in the absence of spend-thrift restrictions. The transferability is not created by the certificates which the trustees issue. They are the letters which the trustees under a will may properly send to their beneficiaries informing them of the extent of their interests.

Even with the enlargement of an imported definition, it is a distortion of language to speak of these trustees as a "corporation" to be taxed on its "capital stock." These are words of the law of corporations and not of trusts.

It is unnecessary to consider whether, because of any control in the beneficiaries imposing a personal liability under the Massachusetts decisions, these trusts should be called partnerships and so, under the second classification. Partnerships are not subject to the capital stock excise.

There has been no change in the law indicating an intention to impose this privilege tax on a body that does

not have any special privileges. There has been no change in the law rendering inapplicable the decisions in *Malley* v. *Crocker* and *Eliot* v. *Freeman*.

In the ordinary use of the terms, (1) the trustees are trustees (2) they are not an association, (3) they are not organized, (4) they are not created under any law, and (5) they have no special privilege.

Respectfully submitted,

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